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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS DEAN VOGT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Questions Presented

1. Whether the law on conspiracy to distribute narcotics may be extended to the mere association of social drug users and suppliers who share cocaine in party settings on a not-for-profit basis.

2. Whether sentencing courts have the authority to grant a downward departure from the Sentencing Guidelines in an atypical conspiracy to distribute case involving not-for-profit sharing of cocaine among social drug users.

3. Whether sentencing courts can assess a defendant purchaser with drugs possessed by his supplier absent a finding that the quantity held by the supplier was in furtherance of their alleged conspiracy.

4. Whether sentencing courts may resolve a dispute as to the quantity of drugs to be assessed to a defendant at

sentencing by arbitrarily picking a number halfway between the government's and defendant's position.

List of Parties

Apart from the petitioner, the other parties to the appeal before the United States Court of Appeals for the Eighth Circuit, whose judgment is sought to be reviewed, were Larry Gene Regennitter and Harry Wayne Ambrose.

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IN THE

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OCTOBER TERM, 1991

THOMAS DEAN VOGT,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Thomas Dean Vogt respectfully requests that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Eighth Circuit entered on May 15, 1991.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit, United States v. Thomas Dean Vogt, No. 90-1610NI (May 15, 1991), is annexed in the Appendix hereto at 1a-6a. The order of the Eighth Circuit Court of Appeals denying a petition for a rehearing containing a suggestion for rehearing en banc appears in the Appendix at 7a.

Statement of Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit affirming petitioner's conviction was entered on May 15, 1991. On June 25, 1991, the Court of Appeals denied a petition for rehearing containing a suggestion for rehearing en banc. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions

The Fifth Amendment to the United States Constitution provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

Statement of the Case

Following a one-month jury trial in the United States District Court for the Northern District of Iowa, petitioner Thomas Dean Vogt was convicted of various offenses arising out of his recreational use of cocaine with other social cocaine users and suppliers, generally in party settings.

Petitioner was convicted of distributing cocaine to a minor,[1] in violation of 21 U.S.C. §§ 841(a)(1) and 845(a) (Count

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[1]This charge related to petitioner's sharing of cocaine with a 20-year-old prostitute who admitted that she had used cocaine and heroin before she ever even met petitioner.

15); possession with the intent to distribute cocaine, in violation of 21 U.S.C.§ 841(a)(1) (Count 18); making his house available for distributing and using cocaine, in violation of 21 U.S.C. § 856 (Count 19); conspiracy to violate the narcotics laws, in violation of 21 U.S.C. § 846 (Count 20) and engaging in conduct which subjected his assets to forfeiture (Count 25). He was acquitted on one count of distributing cocaine to a minor (Count 16) and one count of distributing cocaine (Count 17).

On March 1, 1990, petitioner was sentenced under the Sentencing Guidelines to 110 months imprisonment, to be followed by five years of supervised release.

On April 13, 1990, petitioner filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit. On May 15, 1991, the Court of Appeals

affirmed his conviction. On June 25, 1991, the Court of Appeals denied his petition for rehearing with a suggestion for rehearing en banc.

On September 18, 1991, Associate Justice Harry A. Blackmun granted petitioner's application for an extension of time within which to file the instant petition for a writ of certiorari, and ordered that the petition by filed by November 22, 1991. (8a).

Statement of Facts

A. Introduction

Petitioner, a 33-year-old Iowa businessman at the time of trial, regularly used cocaine at parties and other social gatherings. It was undisputed that he never sold cocaine or any other controlled substance. Nevertheless, and notwithstanding that the government conceded that petitioner's involvement with cocaine was on a purely social and not-for-profit basis, petitioner was charged with conspiring to distribute cocaine, making his house available for cocaine use, and possession with intent to distribute.

The conspiracy charge was based on the government's theory that petitioner and his co-defendants had a tacit agreement to acquire cocaine from a group of drug suppliers for their own use and

for sharing with their friends at social gatherings. Similarly, the charges of possession with intent to distribute and making his home available for the use of cocaine were predicated upon petitioner's sharing of cocaine with friends in social settings. There was no allegation -- and not a scintilla of proof adduced at trial -- that petitioner's involvement with cocaine was on anything other than a social, not-for-profit basis. Indeed, nearly all of the government's witnesses were friends of petitioner who testified that they had used cocaine socially with him and that he shared his cocaine with others.

B. The "Conspiracy"

According to the government, petitioner was part of a conspiracy which had three "distinct but related" groups of participants. The first group consisted

of three individuals, Keith McVay, Tim Johnson and Lon Vogt (petitioner's brother), each of whom supplied cocaine to the second group, composed of petitioner and his co-defendants. The third group consisted of individuals with whom petitioner and his co-defendants shared their cocaine, free of charge, at parties or get-togethers.

To prove that petitioner was a party to an illegal agreement to acquire cocaine for distribution to others, the government relied essentially on five witnesses. The following summarizes the testimony of each of these witnesses in the light most favorable to the government:

1. Rod Jiruska -- Jiruska, originally one of petitioner's co-defendants, pleaded guilty prior to trial and testified against petitioner. Jiruska was a personal friend of petitioner who

bought cocaine with petitioner and used it with him and others at social gatherings. The government, therefore, categorized him as a "second group" conspirator -- one who bought cocaine and then subsequently shared it with others at parties.

Importantly, however, though Jiruska was permitted to plead guilty to conspiracy as part of his plea bargain, his testimony did not even come close to establishing the traditional elements of conspiracy. He conceded that:

> There was no formal understanding or worded understanding. It was just a matter of social presence, I guess. If one of us had it, you would share it with the other just like you would with drinks.

(R. 1534).[2]

Jiruska further admitted that he had no understanding (either explicit or

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[2]Citations preceded by the letter "R." refer to pages from the trial record.

implicit) with petitioner about sharing cocaine; nor was there any agreement that if he shared his cocaine with petitioner on a particular day, petitioner would provide him with some later. While Jiruska occasionally shared his cocaine with others, he did so because he wanted to and not pursuant to any agreement. (R. 1604-1605).

2. Ron Kelley -- Kelley was another friend of petitioner's in the so-called "second group" who was originally named as a co-defendant, but then pleaded guilty and testified against petitioner at trial. Like Jiruska, however, Kelley was unable to substantiate that a conspiracy to distribute existed. He denied having any agreement with petitioner or anyone else to share cocaine. (R. 1664, 1702-03). Although he shared his cocaine at parties and other social gatherings (R. 1704), he

never had a single conversation with anyone about when or where cocaine would be shared, or even whether it would be available. (R. 1697).

3. Tim Johnson -- Johnson was a supplier who testified that petitioner occasionally purchased cocaine from him and then shared it with him. Johnson attended parties at petitioner's residence at which cocaine was used, (R. 1273, 1276, 1284), and explained that if he wanted to use cocaine but didn't have any, it was "just courtesy [for others] to share." (R. 1287).

4. Keith McVay -- McVay also supplied cocaine to petitioner and attended social gatherings at petitioner's home. At parties, McVay shared his cocaine with others and assumed that others would share theirs with him. (R. 302). Significantly, McVay pointed out

that the cocaine was used recreationally and was incidental to the purpose for which the parties were held:

> [J]ust because there was parties does not necessarily mean they were intended to be coke parties, just people that had coke that went there. They were like for birthday parties, various parties[.]

(R. 318).

5. Lon Vogt -- On occasion, Vogt, petitioner's brother, sold cocaine to petitioner. However, he had no agreement with petitioner that the cocaine which petitioner acquired from him was to be shared or distributed to others. As with McVay, Vogt shared his cocaine with others at social gatherings simply because he wanted to:

> Yeah, if I was at a party and I put out however many lines, or whatever I wanted to put out, I did it because I wanted to.

(R. 2055). In Vogt's view, if someone at a party shared their cocaine with him,

"that was their business." (R. 2063). However, there was no agreement to do so.

* * *

Based on the testimony of these witnesses, petitioner was convicted of conspiring to acquire cocaine and distribute it to others.

C. Request for Downward Departure

Petitioner requested that the district court depart downward from the Sentencing Guidelines on the ground that the charges against him did not involve the distribution of narcotics for profit. Although the government conceded that the case did not involve the sale or distribution of drugs for commercial gain, the court denied petitioner's request because it did not think it had the power to grant a departure on that basis. The court explained that:

> The Sentencing Commission is charged with the responsibility of implementing the statute, it cannot create law where the law doesn't exist, and so this Court does not believe it can create law where law doesn't exist, and to depart from the established guidelines on the basis that there is no profit made would be to carve out in effect an exception to the statute, which the Court is not privileged to do.

(S.R. 189) (emphasis added).[3]

D. The Quantity Assessment

At the time of sentencing, the district court attributed a total quantity of 841.45 grams of cocaine to petitioner, thus giving him a base offense level of 28. The total quantity included (i) 283.5 grams relating to two purchases petitioner made from Keith McVay, and (ii) 250 grams relating to purchases he made from Tim Johnson.

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[3]Citations preceded by the letters "S.R." refer to pages from the record of petitioner's sentencing.

1. The Purchases from McVay

The court assessed petitioner with 283.5 grams that McVay had, or said he had, when he sold smaller amounts of cocaine to petitioner on two occasions. On the first occasion, petitioner told McVay that he wanted to purchase a half ounce of cocaine. McVay went to petitioner's house with a bag containing over two ounces of cocaine, removed the half ounce and gave it to petitioner. Nevertheless, at sentencing, petitioner was assessed with the full two ounces -- four times the amount he bought from McVay.

On the second occasion, McVay sold petitioner one ounce of cocaine and mentioned to him that the ounce had come from a half-pound quantity that he, McVay, had recently purchased. Again, at sentencing, the full half pound -- eight

times what he had purchased -- was attributed to petitioner.

There was no finding at sentencing that McVay held these large quantities "in furtherance of the conspiracy" in which petitioner was an alleged member. Rather, the court simply found that it was "not unreasonable" for petitioner to foresee that McVay -- as a cocaine supplier -- would possess these large quantities.

2. The Purchases From Johnson

The court's assessment of the total quantity of drugs involved also included 250 grams of cocaine relating to petitioner's purchases from Tim Johnson. The amount that was properly attributable to petitioner as a result of these purchases was hotly disputed at sentencing. The government relied on the pre-sentence report ("PSI") and took the position that the court should attribute

425.25 grams to petitioner. On the other hand, petitioner argued that no more than 99 grams should be attributed to him. The court, without any explanation whatsoever, split the difference and arbitrarily assessed petitioner with 250 grams.

REASONS FOR GRANTING THE WRIT

I.

THERE IS A CONFLICT BETWEEN THE EIGHTH AND ELEVENTH CIRCUITS AS TO WHETHER THE LAW ON CONSPIRACY TO DISTRIBUTE NARCOTICS MAY BE EXTENDED TO THE MERE ASSOCIATION OF DRUG USERS AND SUPPLIERS WHO SHARE COCAINE IN PARTY SETTINGS ON A NOT-FOR-PROFIT BASIS.

The government's attempt to expand conspiracy law in drug distribution cases to cover not-for-profit, social associations among casual drug users and their suppliers has recently been rejected on strikingly similar facts as are present at bar. In United States v. Hardy, 895 F.2d 1331 (11th Cir. 1990), the Eleventh Circuit Court of Appeals reversed the defendant's conviction for participating in a conspiracy to distribute cocaine which was predicated on nothing more than the defendant's social cocaine use and his association with other drug users and suppliers in party settings.

The critical facts of Hardy are almost on all fours with the facts here. The defendant Hardy was a frequent user of cocaine, and regularly hosted parties at his residence which were attended by drug users and suppliers. Hardy had jointly obtained and used cocaine with friends and had shared cocaine with others in his home. At trial, the government offered the testimony of fifteen of Hardy's friends, all of whom had pleaded guilty and testified in return for favorable treatment by the government. All of these witnesses testified that they had used cocaine in Hardy's home on a purely social basis and that Hardy had possessed and used drugs with them. There was no evidence, however, that Hardy possessed large quantities of cocaine or that he had ever engaged in the sale or distribution of narcotics for commercial gain.

In the government's view, these facts were legally sufficient to establish a conspiracy to distribute cocaine. In arguing for the affirmance of Hardy's conviction on appeal, the government urged that the cocaine parties hosted by Hardy and his friends "reflected a joint effort to obtain cocaine, distribute the drug among select invitees, and then consume it." (Govt. Brief on Appeal in United States v. Hardy, excerpted herein in the Appendix at 9a-15a, at p. 11a.) The government also argued that a conspiracy had been established because:

> The evidence showed that [Hardy] provided a secure place where cocaine could be delivered, that oftentimes the suppliers were also guests of [Hardy], that cocaine was knowingly distributed and shared on the premises by [Hardy] and his invitees, and that the incidents constituted "regularized activity" recurring over a substantial period of time.

Id.

Thus, the government in Hardy put forth precisely the same novel theory of a conspiracy to distribute cocaine as was relied upon here.[4]

In Hardy, however, the Eleventh Circuit reversed, finding that the evidence was insufficient to sustain the defendant's conviction for conspiracy to distribute cocaine. The court ruled that although Hardy was a drug user and had hosted parties where cocaine was bought, sold and consumed, there was no basis to conclude that he was a party to an agreement to distribute.

In rejecting the government's overzealous attempt to extend the law to cover Hardy's conduct, the court cautioned that "conspiracy law is not a dragnet for

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[4]Under the government's extreme theory, every drug user who does not use his or her drugs alone would be guilty of a conspiracy to distribute.

apprehending those with criminal dispositions." 895 F.2d at 1335 (citation omitted). It further noted that while a vigorous effort on the part of the government to prosecute drug offenders is laudable, the salutary goal of winning the "war on drugs" must not eclipse our society's fundamental protection that no defendant may be convicted except upon evidence which is legally sufficient to establish that he committed the crime charged. Id. at 1333.

Thus, in reversing Hardy's conviction for conspiracy to distribute cocaine, the Eleventh Circuit refused to extend the law on conspiracy to distribute narcotics to the mere association of social drug users and suppliers. The Eighth Circuit's affirmance of petitioner's conviction for conspiracy to distribute cocaine is completely at odds with Hardy. Given the

striking similarity of the facts in these cases, the two decisions are hopelessly irreconcilable.

Here, as in Hardy there was not a scintilla of proof, even viewing the evidence in the light most favorable to the government, that petitioner was a party to an agreement -- explicit or tacit -- to distribute cocaine. Rather, as in Hardy, the evidence merely established petitioner's possession of cocaine, his purchase of it from suppliers, his use of it at social gatherings in his home and his occasional sharing of it with others. As in Hardy, there was absolutely no evidence adduced at trial that petitioner ever profited from his involvement in cocaine; similarly, the amount of cocaine which petitioner possessed at any one time was relatively small.

In affirming petitioner's conviction for conspiracy to distribute cocaine, the Eighth Circuit essentially endorsed the view that the mere association among drug users and suppliers, coupled with the frequent use of drugs -- even on a purely recreational, not-for-profit basis -- can form the basis for a conspiracy to distribute cocaine. Insofar as the Eleventh Circuit in Hardy refused to conclude that under such circumstances a tacit agreement to distribute cocaine existed, its decision is in direct conflict with the law of the Eighth Circuit and certiorari should be granted to resolve this split in the Circuits.

II

THIS COURT SHOULD CONFIRM THAT SENTENCING COURTS HAVE THE AUTHORITY TO GRANT A DOWNWARD DEPARTURE FROM THE SENTENCING GUIDELINES IN AN ATYPICAL CONSPIRACY TO DISTRIBUTE CASE INVOLVING NOT-FOR-PROFIT SHARING OF COCAINE AMONG SOCIAL DRUG USERS.

A. Introduction

Prior to sentencing, petitioner moved before the district court for a downward departure from the Sentencing Guidelines on the ground that he did not engage in the distribution of narcotics for profit. Believing that it lacked the authority to grant a departure on this ground, the court denied petitioner's application. S.R. 89.

On appeal, the Eighth Circuit compounded the district court's error by holding that the district court did not abuse its discretion in denying a downward departure. (5a). It further held that

the district court's refusal to depart was not reviewable. Id.

The Court of Appeals was wrong on both scores. Petitioner did not even argue that the district court abused its discretion in denying departure, but rather that the court erroneously thought it did not have the statutory authority to depart. As such, the court's refusal to depart because it believed it lacked the power to do so was fully reviewable by the Court of Appeals.

B. Authority to Depart Downward in an Atypical Case

On the facts of this case, the district court clearly had the authority to sentence petitioner below the applicable guideline range. A sentencing court may depart from the guidelines if it finds that there is "an aggravating or mitigating circumstance of the kind, or to

a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0, p.s. In determining whether the Sentencing Commission adequately took a particular factor into account, a court can consider only the guidelines, policy statements, and official commentary of the Sentencing Commission. Id.; United States v. Feinman, 930 F.2d 495, 501 (6th Cir. 1991).

As a general proposition, it seems plain that the relatively harsh penalties for drug offenders which are mandated by the guidelines reflect the Commission's view that drugs are the scourge of our society and that individuals who engage in narcotics trafficking for profit should be

punished severely.[5] It is far from clear, however, that the Commission ever contemplated that these severe penalties would be imposed where the activity did not involve any potential economic gain to the participants.

A thorough review of the guidelines, policy statements, and official commentary fails to reveal any indication whatsoever that in promulgating the guidelines relating to drug offenders, the Commission considered the possibility of a conspiracy to distribute narcotics entailing a not-

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[5]This is confirmed by comparing the guideline ranges for trafficking (§ 2D1.1) with those for mere possession (§ 2D2.1). See also United States v. Swiderski, 548 F.2d 445 (2d Cir. 1977) ("statutory drug enforcement scheme . . . draws a sharp distinction between drug offenses of a commercial nature and illicit personal use of controlled substances"). In addition, since 21 U.S.C. § 841(b)(1) provides the "primary basis" for the guidelines on drug trafficking, U.S.S.G. § 2D1.1 comment. (n.10), these harsh penalties reflect Congress' view as well.

for-profit, recreational "sharing" of drugs, as opposed to a scheme designed to achieve some commercial gain. This is hardly surprising given that there does not appear to be a single reported case in which the government has ever successfully prosecuted a not-for-profit conspiracy to distribute drugs.

The guidelines were designed to incorporate only those factors which made a "significant difference in pre-guidelines sentencing practice." U.S.S.G. Ch. 1, Pt. A, intro. comment. 4(b). Where the guidelines do not take a factor into account, it is often because the factor did not occur with any frequency in pre-guidelines practice and was therefore "not empirically important in relation to the particular offense." Id. As the Sentencing Commission specifically pointed out: "[R]are occurrences are precisely the

type of events that the courts' departure powers were designed to cover -- unusual cases outside the range of the more typical offenses for which the guidelines were designed." Id.

The rare case of a not-for-profit conspiracy to distribute cocaine -- if such a legal creature can exist -- presents precisely the type of unusual case in which the court is entitled to depart from the guidelines. As the Sentencing Commission indicated:

> The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guidelines linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion and Socio-Economic Status), the third sentence of § 5H1.4 (Physical Condition,

> Including Drug Dependence and Alcohol Abuse), and the last sentence of § 5K2.12 (Coercion and Duress) list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

Id. (emphasis added).

In instances where the Commission, in formulating the guidelines, did consider the lack of a profit motive in the commission of an offense, it directed that the applicable offense level be decreased by up to eight levels. See U.S.S.G. § 2G1.1, comment. (n.1) (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) ("In the infrequent case where the defendant did not commit the offense for profit . . . the Commission recommends a downward

departure of 8 levels"); U.S.S.G. § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) ("If the defendant committed the offense other than for profit, decrease by 3 levels"); U.S.S.G. § 2L2.1 (Trafficking in Evidence of Citizenship or Documents Authorizing Entry) (same); U.S.S.G. § 2L2.3 (Trafficking in a United States Passport) (same). Thus, when the lack of a profit motive in the commission of certain offenses was brought to the Commission's attention, the Commission acted in an affirmative way to ensure that the defendants in such cases would benefit from a reduced offense level.

Here, the district court concluded that since the Commission considered profit motive with respect to certain offenses, it must have also considered it -- and found it irrelevant -- with regard

to the distribution of narcotics. S.R. 89. Such reasoning, however, flies in the face of the Commission's explicit proviso that "the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case." U.S.S.G. Ch. 1, Pt. A, intro. comment 4(b) (emphasis added). Thus, simply because the guidelines do not list profit motive as a specific offense characteristic for narcotics offenses does not mean that such a factor should not be considered relevant to sentencing. See U.S.S.G. § 5K2.0, p.s. ("[A] factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean there may not be circumstances when that factor would be relevant to sentencing.")

Under the guidelines themselves, the court had the authority to grant petitioner a downward departure on the ground that his conduct was not in furtherance of commercial gain. Id. The district court erroneously ruled that it was powerless to grant a downward departure. Accordingly, certiorari should be granted to resolve the important question of whether downward departure is authorized in an atypical conspiracy to distribute case involving the not-for-profit sharing of cocaine among social drug users.

C. Reviewability of Refusal to Depart Downward

In general, a sentencing court's failure to depart downward from the guidelines is not reviewable. See United States v. Richardson, 901 F.2d 867 (10th Cir. 1990) and cases cited therein at 870;

18 U.S.C. § 3742. However, where, as here, the court imposes a sentence within the guideline range, but under the erroneous belief that it had no authority to grant a downward departure, the sentence is "imposed as a result of an incorrect application of the sentencing guidelines," and is reviewable. 18 U.S.C. § 3742(a)(2).

Accordingly, whether the court had the authority to depart downward in this case -- as opposed to whether it should have done so, in the exercise of its discretion -- is a question of law that was subject to plenary review. United States v. Lowden, 905 F.2d 1448, 1449 (10th Cir.), cert. denied, __ U.S. __, 111 S.Ct. 206 (1990); United States v. Ortiz, 902 F.2d 61, 63-64 (D.C. Cir. 1990); United States v. Rosen, 896 F.2d 789, 792 (3d Cir. 1990); United States v. Fossett,

881 F.2d 976, 979 (11th Cir. 1989); United States v. Russell, 870 F.2d 18 (1st Cir. 1989). For this reason, the Eighth Circuit erred in ruling that petitioner's claim was not cognizable on appeal.

The Eighth Circuit's own prior cases establish that the refusal to depart downward because of an erroneous belief regarding the court's authority is reviewable. See, e.g., United States v. Evidente, 894 F.2d 1000, 1005 (8th Cir.) cert. denied, __ U.S. __, 110 S.Ct. 1956 (1990). The Court of Appeals' decision in this case to the contrary thus represents an unwarranted refusal by the Eighth Circuit to follow its own precedent, and therefore certiorari should be granted.

III

BY UPHOLDING THE DISTRICT COURT'S DETERMINATION AS TO THE QUANTITY OF COCAINE INVOLVED, THE COURT OF APPEALS SANCTIONED A DEPARTURE FROM ACCEPTED CRIMINAL PROCEDURE.

A. Quantities Possessed By Co-Conspirators

As indicated in the Statement of Facts supra, petitioner was assessed at sentencing with 283.5 grams of cocaine that Keith McVay -- a supplier and alleged unindicted co-conspirator -- had, or said he had, when he sold small amounts of cocaine to petitioner on two occasions. Petitioner objected to being assessed with any more than the 42 grams of cocaine that he purchased from McVay.

Under the Sentencing Guidelines, petitioner could be assessed with the cocaine possessed by McVay only if the sentencing court found that McVay's possession of these large quantities was

both 1) in furtherance of the conspiracy, and 2) reasonably foreseeable to petitioner. U.S.S.G. § 1B1.3, comment. (n.1); United States v. North, 900 F.2d 131 (8th Cir. 1990); United States v. Joyner, 924 F.2d 454 (2d Cir. 1991); United States v. Carmody, 753 F. Supp. 917 (M.D. Ala. 1990), aff'd, 940 F.2d 673 (11th Cir. 1991).

The district court made no finding whatsoever that McVay possessed the 283.5 grams in furtherance of the alleged conspiracy. Rather, the court attributed all of McVay's cocaine to petitioner on the sole ground that it was not unreasonable for petitioner to foresee that McVay -- a drug dealer -- would have such a large quantity of drugs on hand. S.R. 395. Thus, the court totally disregarded the first prong of the two-prong test set forth in the guidelines for

determining whether petitioner could be held accountable for the drugs possessed by McVay.

The district court's failure to make an explicit factual finding that the cocaine attributed to petitioner was "in furtherance of the conspiracy" was in clear derogation of the Sentencing Guidelines, which sets forth the circumstances in which the sentencing court may attribute an alleged co-conspirator's drugs to a defendant at sentencing.[6] Cf. United States v. Rivera, 898 F.2d 442 (5th Cir. 1990) (narcotics distribution case remanded because district court did not make any findings in assessing defendant with quantities of hereon attributable to his co-defendants).

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[6]The point is not simply an academic one. Sentences under the Guidelines for drug offenses are, for the most part, determined by the quantity of drugs involved. See U.S.S.G. § 2D1.1(a)(3).

As the Eighth Circuit itself has held in a case involving quantity determinations under the guidelines, "[s]imple knowledge that a supplier supplies other persons is not enough . . . to assess all quantities attributed by the supplier to each person who purchased drugs from that supplier." North, 900 F.2d at 134; see Carmody, supra. Rather, before a supplier's drugs can be attributed to a purchaser, there must be an agreement between the purchaser and the supplier which includes as part of its purpose the sale of drugs by the supplier to other individuals. North, 900 F.2d at 133.

Where, as here, there was no evidence that petitioner had any agreement with McVay concerning McVay's sale of drugs to other individuals, there is no basis for

attributing all of McVay's cocaine to petitioner.[7] See North, supra.

In affirming the district court's attribution of McVay's cocaine to petitioner without first having made a finding that McVay possessed the total amount -- 283.5 grams -- in furtherance of the alleged conspiracy, the Court of Appeals departed from the established procedure mandated by the guidelines and its own decision in North, supra. For this reason, certiorari should be granted.

B. There Must Be Proof in the Record for the Quantity Assessed.

The court assessed petitioner with 250 grams of cocaine as a result of his purchases of cocaine from another

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[7]There was no evidence that petitioner or any of his alleged co-conspirators ever bought, sold, used, or otherwise had any connection whatsoever with the large quantities of cocaine belonging to McVay.

supplier, Tim Johnson. However, the court failed to provide any explanation whatsoever for its determination. Furthermore, there was no proof in the record for the quantity that the district court assessed. Rather, the court simply picked a number, arbitrarily, which was approximately halfway between the government's and petitioner's position.

Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure requires that the court make a specific finding as to each matter in the PSI that is disputed by a defendant, or state that no finding is necessary because the disputed matter will not be taken into account at sentencing. The rule serves two purposes: 1)- it safeguards a defendant's due process right to fair sentencing procedures -- in particular, the right to be sentenced only on the basis of accurate information, and

2) it ensures that there will be a complete record regarding the district court's resolution of disputed facts to facilitate judicial review. United States v. Mischler, 787 F.2d 240, 246 (7th Cir. 1986) (citation omitted). Strict compliance with the Rule is required, and if the district court fails to make the required findings or determinations prior to sentencing, the sentence must be vacated and the defendant resentenced. See, e.g., United States v. Fernandez-Angulo, 897 F.2d 1514, 1516 (9th Cir. 1990) (en banc).

Here, the district court merely prepared a chart entitled "Final Quantity Determinations" which indicated the number of grams that the court decided should be attributed to each of the defendants. There was no record made, nor any explanation given, as to the basis for any of the numbers on the court's chart.

Furthermore, the government's position at sentencing was that petitioner should be assessed with 425.25 grams of cocaine, representing thirty one-half ounce purchases from Johnson. Petitioner testified that his purchases from Johnson amounted to no more than 99 grams. In attributing petitioner with 250 grams, the court assessed an amount that was not even suggested by any of the evidence before it. Under these circumstances, it was clearly obligated to state on the record how it arrived at the figure it did. Cf. United States v. Weichert, 836 F.2d 769, 772 (2d Cir. 1988) (sentencing court should indicate the basis for the precise amount it chose to order as restitution).

Although the guidelines permit the sentencing court to approximate the amount of unseized drugs attributable to a defendant, U.S.S.G. § 2D1.4, comment.

(n.2), the Eighth Circuit itself has acknowledged that there must be some evidence in the record to support the court's approximation. United States v. Lawrence, 915 F.2d 402, 408 (8th Cir. 1990). Thus, while any reliable information may be considered in making the approximation, see U.S.S.G. § 6A1.3(a), there must be an acceptable evidentiary basis for the court's finding. United States v. Rodriguez, 897 F.2d 1324 (5th Cir.), cert. denied, __ U.S. __, 111 S.Ct. 158 (1990).

Here, there was no rational or factual basis in the record to support the court's determination that the quantity to be assessed as a result of the Johnson sales was 250 grams. Arbitrarily picking a number which is halfway between the government's and petitioner's position is hardly an "acceptable evidentiary basis"

upon which a finding can be made. Rodriguez, 897 F.2d at 1326. See Lawrence, supra (district court reversed for arbitrarily approximating the quantity of cocaine attributed to defendant who was involved in a four-year drug conspiracy by simply dividing in half the amount of cocaine the defendant admitted purchasing over an eight-year period).[8]

In affirming the district court in this case, the Eighth Circuit departed from accepted criminal procedure as well as its own precedent requiring that drug quantities, even if approximated, be based on the evidence adduced, rather than being arrived at arbitrarily. For this reason, certiorari should be granted.

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[8]It is interesting to note that the district judge who was reversed in Lawrence for arbitrarily approximating the amount attributed to the defendant is the very same district judge who arbitrarily approximated the amount of cocaine relating to the Johnson sales here.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Dated: New York, New York
November 22, 1991

Respectfully submitted,

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Of Counsel

Karen F. Silverman
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APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 90-1460NI

United States of America, *
*
Appellee, *
v. *
*
Larry Gene Regennitter, *
*
Appellant. *

No. 90-1610NI

United States of America, * Appeals
* from the
Appellee, * United
* States
v. * District
* Court
Thomas Dean Vogt, * for the
* Northern
Appellant. * District
of Iowa.

[UNPUBLISHED]

No. 90-1611NI

United States of America, *
*
Appellee, *
v. *
*
Harold Wayne Ambrose, *
*
Appellant. *

Submitted: November 12, 1990
Filed: MAY 15, 1991

Before LAY, Chief Judge, FAGG, Circuit Judge, and LARSON,* District Judge.

PER CURIAM.

Larry Regennitter, Thomas Vogt, and Harold Ambrose (collectively the appellants) appeal their convictions and sentences for conspiracy to distribute cocaine and related crimes. We affirm.

The appellants raise several contentions related to the sufficiency of the evidence supporting their convictions. We reject all of these contentions. First, the record contains substantial evidence on which the jury reasonably could have found appellants guilty of all charges. Second, the district court did not abuse its discretion in denying the motions for severance and for judgment of acquittal, or in instructing the jury on

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*The HONORABLE EARL R. LARSON, United States District Judge for the District of Minnesota, sitting by designation.

permissible inferences, essential elements of the crimes, or definitions of the elements. Third, the appellants' assertions of prosecutorial misconduct, insufficiency of the indictments, juror misconduct, and inability to cross-examine a witness either are unsupported by the record, otherwise without legal merit, or both.

The appellants also raise many arguments about their sentences. We reject these arguments as well. First, the Federal Sentencing Guidelines are constitutional. E.g., Mistretta v. United States, 488 U.S. 361 (1989); United States v. Brittman, 872 F.2d 827 (8th Cir.), cert. denied, 110 S. Ct. 184 (1989). Second, the district court's factual findings regarding the quantity of cocaine, role in the offense, obstruction of justice, acceptance of responsibility,

and criminal history are not clearly erroneous.

Because the district court did not violate law when imposing the appellants' sentences within the applicable guidelines range, or misapply the guidelines, we must affirm the sentences. United States v. Evidente, 894 F.2d 1000, 1003-04 (8th Cir.), cert. denied, 110 S. Ct. 1956 (1990). Finally, the district court did not abuse its discretion in denying departure below the guidelines range for circumstances the sentencing commission considered when formulating the guidelines, and we cannot review the district court's refusal to depart for circumstances the commission failed to consider. 18 U.S.C. §§ 3553(b), 3742(e) (1988); Evidente, 894 F.2d at 1004 & n.5.

Accordingly, we affirm. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 90-1610NI

United States of America,	* Order Denying
	* Petition for
Appellee,	* Rehearing with
	* Suggestion for
v.	* for Rehearing
	* En Banc
Thomas Dean Vogt,	*
	*
Appellant.	*

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

June 25, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gens

Clerk, U.S. Court of Appeals, Eighth Circuit

SUPREME COURT OF THE UNITED STATES

No. A-209

Thomas Dean Vogt,

Petitioner

v.

United States

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 22nd, 1991.

/s/ Harry A. Blackmun
Associate Justice of the
Supreme Court of the
United States

Dated this 18th
day of September, 1991.

88 - 3777

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

DUDLEY P. HARDY,

Appellant

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

BRIEF FOR THE UNITED STATES

JOSEPH MAGRI
United States Attorney
Middle District of Florida

MERVYN HAMBURG
Attorney
Department of Justice
Washington, D.C. 20530

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONSPIRACY CONVICTION

Count I of the indictment charged that from about late 1982 to approximately January 1987 appellant conspired to distribute cocaine and to possess cocaine with intent to distribute. Appellant claims that the government failed to prove a conspiracy; in the alternative, appellant contends that the government proved multiple conspiracies that fatally varied with, or constructively amended, the charge in the indictment (App. Br. 27-32). We disagree.

In reviewing the sufficiency of the evidence, this Court must determine whether, viewing the evidence, together with all reasonable inferences and credibility choices, in the light most favorable to the government, a reasonable

trier of fact could find that the evidence established guilt beyond a reasonable doubt. Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Cole, 755 F.2d 748, 755 (11th Cir. 1985). So viewed, the evidence here was ample.

The ongoing cocaine parties sponsored by appellant, his friends and acquaintances, reflected a joint effort to obtain cocaine, distribute the drug among select invitees, and then consume it. The evidence showed that appellant provided a secure place where cocaine could be delivered, that oftentimes the suppliers were also guests of appellant, that cocaine was knowingly distributed and shared on the premises by appellant and his invitees, and that the incidents constituted "regularized activity" recurring over a substantial period of time. United States v. Russell, 703 F.2d

1243, 1247 (11th Cir. 1983). That proof satisfied each of the three elements of a drug conspiracy: the existence of a conspiracy, appellant's knowledge thereof, and his voluntary participation therein. United States v. Alberta, 727 F.2d 1055, 1060 (11th Cir. 1984).

Appellant does not deny that he knowingly shared cocaine on a regular basis with the numerous government witness who testified to that activity. His attack is confined to the question whether the government proved a conspiracy. Appellant raises several points. First he contends that no conspiracy was proved, either because the government established little more than the equivalent of a buyer-seller relationship or because Congress did not intend to punish the exchange of small amounts of drugs for personal use (App. Br. 27-30). Then he

alleges that assuming arguendo that a cocaine party constitutes a cognizable drug distribution conspiracy, the government proved multiple conspiracies rather than the single conspiracy charged in the indictment (App. Br. 30-32).

We do not dispute the premise that a mere buyer and a mere seller do not engage in a criminal drug conspiracy by engaging in a single transaction. However, that principle does not altogether prevent buyers and sellers from being conspirators. Clearly, they may form part of what is characterized as a chain conspiracy. Cf. United States v. Brito, 721 F.2d 743, 747 (11th Cir. 1983). Buyers and sellers become conspirators when they assume roles instrumental to the success of the conspiracy. United States v. Bascaro, 742 F.2d 1335, 1359 (11th Cir. 1984). Here, as in the case primarily

relied upon by appellant, United States v. Burroughs, 830 F.2d 1574, 1581 (11th Cir. 1987), appellant and those who furnished the cocaine for distribution to him and his party guests had a joint objective: distribution of cocaine for consumption on a regular basis in a safe locale. That scenario cannot fairly be equated with instances of isolated sales involving buyers and sellers with nothing more in common. Compare United States v. Ramirez, 608 F.2d 1261, 1264 (9th Cir. 1979).

Nor can appellant escape culpability by contending that Congress did not intend to punish the exchange of small amounts of drugs for personal use as crimes of possession or conspiracy (App. Br. 28). The Drug Abuse Act contains no jurisdictional minimums. Although the possession offense contained in 21 U.S.C. 841(a)(1) must at times be considered in

light of a statute making simple possession for personal use a lesser included offense (21 U.S.C. 844), there is no corresponding lesser included offense statute covering distributions. See United States v. Brown, 761 F.2d 1272, 1278 (9th Cir. 1985). Distribution of any amount of a controlled substance violates 21 U.S.C. 841(a)(1), see United States v. Sims, 529 F.2d 10,11 (8th Cir. 1976). It follows, therefore, that a conspiracy to distribute any amount of a controlled substance violates 21 U.S.C. 846.